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NO. 80-5693

IN THE

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UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

MURRIEL DON CRAWFORD, JR.,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. WHETHER THE ADMISSION OF EVIDENCE TO IMPEACH PETITIONER'S TESTIMONY THAT HE CONFESSED TO THE MURDER SOLELY TO CLEAR HIS CONSCIENCE, IF ERROR, IS HARMLESS BEYOND A REASONABLE DOUBT?

II. WHETHER THIS COURT SHOULD CONSIDER A MATTER TO WHICH NO CONTEMPORANEOUS OBJECTION AS REQUIRED BY STATE LAW WAS MADE AT TRIAL?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to Petitioner's Writ of Certiorari files this its Brief in Oppostion:

OPINION BELOW

Petitioner's conviction for capital murder was affirmed on July 16, 1980; Motion for Rehearing was denied with written opinion on April 15, 1981. Crawford v. State, __ S.W.2d __, No. 57,602 (Tex.Crim.App. 1981).

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Also involved is Article 37.071, Vernon's Ann. C. C. P.

STATEMENT OF THE CASE

Petitioner was indicted for the offense of capital murder on November 18, 1976. On April 11, 1977, Petitioner entered a plea of guilty before the jury. Trial began that date on the issue of punishment. The jury thereafter found as true the special issues submitted pursuant to Article 37.071, Vernon's Ann. C. C. P., and, accordingly, punishment was assessed at death.

The record reflects that on October 22, 1975, Petitioner and his co-defendant, David Mabra, murdered Edith Whitfield during the course of a robbery. Shortly after midnight on the date of the offense, Petitioner and Mabra drove to the farm of Mabra's former employer. There, they burglarized a vehicle and stole several items, including two shotguns and a rifle. A short time later, the two, in Petitioner's truck, drove to a convenience store, intending to rob the cashier. However, after Petitioner got out of the truck, Mabra got scared and the two left. They next drove to a service station, intending to rob the cashier there, but abandoned that plan. They then drove to a Toot n' Totum convenience store, and parked the truck so that it could not be seen. Carrying the .410 shotgun taken in the burglary, Petitioner and Mabra entered the store intending to rob the cashier, Edith Whitfield. After demanding and receiving the contents of the cash register, Petitioner fired the shotgun at Mrs. Whitfield, narrowly missing her head. He then fired a second shot at point blank range, striking her in the eye. Mrs. Whitfield died of this gunshot wound.

Petitioner and Mabra fled the scene of the murder, and shortly thereafter were stopped by an Amarillo police officer, while they were still in possession of the murder weapon. After issuing a traffic citation, the police officer allowed the pair to leave. Petitioner and Mabra returned the murder weapon and the other stolen articles to the vehicle which they had burglarized, returned to Amarillo, and went to a truck stop and had coffee.

Some time thereafter, Petitioner and Mabra were both questioned concerning this robbery-murder. Each gave a confession inculpating the other. According to Petitioner's confession executed on August 25, 1976, Mabra carried the shotgun into the store, committed the robbery, and then shot Mrs. Whitfield twice. However, Jim White, a friend of Petitioner's, testified that shortly after the murder had occurred, Petitioner told him that he could make him (White) lose a night's sleep, and proceeded to tell White about the murder, including that he (Petitioner) "blew [the victim's] head off." Petitioner told White that he held the shotgun and fired one shot at Mrs. Whitfield's head to scare her. According to Petitioner, the shot terrified the woman and Mabra, too. Petitioner then said that he shot again, and bragged that he had hit Mrs. Whitfield in the eye and "pushed her brains out the top of her head." Petitioner stated that he shot the victim because she did not have enough money. Petitioner also related to White how he and Mabra were stopped by a police officer shortly after the murder, and stated that he had intended to stab the officer if the officer looked into the vehicle. Petitioner's only regret in committing the murder was that he had not stopped to eat candy in the store.

Karen Richie testified that she and Petitioner discussed the robbery-murder, and that Petitioner laughingly admitted that he had done the shooting. A woman who worked with Petitioner testified that Petitioner had laughingly admitted to her that he had shot "that old lady" during the robbery. Keith Carreker, who also worked with Petitioner, testified that he had a conversation with Petitioner about the robbery-murder, and that Petitioner had stated, "I shot that old bitch in the face." Petitioner bragged that he was "stone sober," and then threatened Carreker if this information were revealed.

Petitioner testified in his own behalf and blamed the entire incident on his co-defendant, Mabra. He testified that he made this confession to clear his conscience and to "get it off his chest," and that he felt relieved after having done so. On cross-examination, over defense counsel's objection, it was brought out that, in reality, Petitioner had given a confession only after he was confronted with Mabra's confession, in which Mabra stated that it was Petitioner who had carried the gun and shot the victim.

SUMMARY OF THE ARGUMENT

Petitioner pled guilty to the knowing and intentional murder of Edith Whitfield. The only issues to be determined by the jury were whether Petitioner's conduct was deliberate and whether Petitioner would commit future acts of violence to constitute a continuing threat to society. Article 37.071, Vernon's Ann. C. C. P. Petitioner testified at trial that he confessed to his participation in the offense solely to relieve his conscience. Impeachment evidence showed that Petitioner had only confessed after being confronted with his co-defendant's statement which placed the blame for the shooting on Petitioner. The cross-examination of Petitioner regarding his knowlege of this statement was

not error. Further, any error would clearly be harmless beyond a reasonable doubt in light of overwhelming evidence that it was Petitioner and not the co-defendant, who shot and killed the victim.

Petitioner's failure to make a contemporaneous objection required by state law to the exclusion of a prospective juror precludes review of that matter now. The state has a legitimate interest in requiring the parties to object to the exclusion of any juror during voir dire examination. There are many reasons why counsel specifically would not want to voice such objection, for tactical and strategic reasons. Petitioner should not be allowed to voice a complaint now to a matter which he did not find objectionable at trial.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE NOT WORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists.

II.

THE ADMISSION OF EVIDENCE TO IMPEACH PETITIONER'S TESTIMONY THAT HE CONFESSED TO THE MURDER SOLELY TO CLEAR HIS CONSCIENCE, IF ERROR, IS HARMLESS BEYOND A REASONABLE DOUBT.

Petitioner entered a knowing, intelligent, and voluntary plea to the intentional murder of Mrs. Whitfield during the course of a robbery. Thus, the only issues before the jury were whether Petitioner's conduct, which admittedly caused Mrs. Whitfield's death, was committed deliberately, and whether there was a probability that Petitioner would commit

future acts of criminal violence that would constitute a continuing threat to society. Article 37.071(b), Vernon's Ann. C. C. P. The state presented ample evidence that Petitioner was the "triggerman" or the one who shot Mrs. Whitfield during the robbery. The state also presented evidence that Petitioner had planned to murder a police officer, that he committed two other burglaries, that he knowingly sold stolen firearms, and that he had committed arson by starting fires in the factory where he worked.

Petitioner testified in his own behalf and admitted that on the night of the murder, he had intended to commit robberies. He admitted that he entered the Toot n' Totum store with the intent to rob the cashier. His theory of defense, however, was that Mabra had carried the gun into the store and shot the victim. Petitioner's confession, in which he admitted his participation in the offense but accused Mabra of shooting Mrs. Whitfield, was introduced into evidence. Petitioner further testified that he confessed to his participation in the offense in order to clear his conscience and to "get it off his chest", and that he felt relieved after he did so.

On cross-examination, however, Petitioner admitted that this testimony did not quite present an accurate picture to the jury. He admitted that during lengthy interrogation, he had continuously denied his involvement in the murder, until he was read a confession given by Mabra, in which Mabra stated it was Petitioner who carried the gun into the store and shot Mrs. Whitfield. It was only at this point that Petitioner decided to give a statement. The prosecutor cross-examined Petitioner about his knowledge of the contents of Mabra's statement, not to prove the truth of the contents of the statement, but to show Petitioner's motivation for

confessing to the offense and to impeach the testimony presented by Petitioner that he had confessed solely because his conscience bothered him.

Contrary to Petitioner's assertions, this impeachment evidence did not constitute the inadmissible hearsay condemned in Bruton v. United States, 391 U.S. 123 (1968). The impeachment evidence was not admitted to prove the truth of the matters asserted therein, i.e., that Petitioner shot Mrs. Whitfield. The impeachment evidence was admissible to show that Petitioner had knowledge, prior to making his confession, that Mabra had already inculpated him. This evidence simply showed that Petitioner's knowledge of Mabra's statement, and not his guilty conscience, was his motivation for confessing to participating in the commission of the offense. Since the truth of the contents of Mabra's statement was not in issue, Petitioner was not denied his right of confrontation. Anderson v. United States, 417 U.S. 211 (1974).

Further, any error in the admission of this impeachment evidence is harmless beyond a reasonable doubt, as the evidence that Petitioner was the triggerman was overwhelming. Petitioner had admitted to four friends that he had intentionally, deliberately and callously shot the victim in her eye during the robbery. Mabra's statement that Petitioner had done the shooting was merely cumulative of other evidence, and relatively insignificant in light of the other evidence presented. Here, as in Schneble v. Florida, 405 U.S. 427 (1972), the prejudicial effect of the evidence contained in the statement of the co-defendant is so insignificant in the context of all of the other evidence of Petitioner's conduct, that it is clear beyond a reasonable doubt

that its admission, if error, was harmless and would not have affected the jury's findings on the special issues. 1/

III.

THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH NO CONTEMPORANEOUS OBJECTION AS REQUIRED BY STATE LAW WAS MADE AT TRIAL.

This Court has consistently declined to review matters to which no objection was made at trial, when state law requires such objection. The failure of a defendant to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499 n. 7 (1978). The Texas Court of Criminal Appeals held that Petitioner had waived his contention that venireman Martha Stulce was excluded from the jury panel in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). At the time of Petitioner's trial the state law was settled that the failure of a defendant to voice a contemporaneous objection to the exclusion of a venireman in violation of Witherspoon waived the consideration of the error on appeal. Boulware v. State, 542 S.W.2d 677 (Tex. Crim. App. 1976).

Contrary to Petitioner's assertions, the state court had not held that an objection to the exclusion of a juror pursuant to a state statute, Section 12.31(b), V.T.C.A.

1/ Petitioner contends that he was harmed by the admission of this evidence, as the jury was left with an erroneous impression that Petitioner had carried the gun into the store. After Petitioner gave his confession in which he stated that Mabra had carried the gun and fired the shots, Mabra then admitted that he, not Petitioner had first carried the gun into the store. However, Mabra never retracted his statement that Petitioner fired the shots. The evidence concerning which one of the two actually carried the gun into the store is insignificant and could not have affected the jury's determinations given the other facts. It is undisputed that Petitioner and Mabra entered the store intending to rob the victim, and the evidence is overwhelming that Petitioner shot the victim. Thus, that Mabra later changed a detail in his statement, which was insignificant in the context of these facts, does not render the evidence harmful.

Penal Code, was without merit. Rather, prior to this Court's decision in Adams v. Texas, __ U.S. __, 100 S.Ct. 2521 (1980) the state court had recognized Section 12.31(b) to be an independant state ground for the exclusion of prospective jurors. An objection on federal constitutional grounds, however, has always been necessary to preserve a federal constitutional claim.

At the time of Petitioner's trial, an objection on federal constitutional grounds to the exclusion of venireman Stulce would not have been "worthless," as Petitioner claims. An objection would have preserved error if, for example, the state court had ruled in favor of Petitioner's state appellate claim that the juror's answers were insufficient to disqualify her under the state statute (Brief of Appellant at 18). Further, had Petitioner voiced any objection to the exclusion of this juror, the trial court, in an abundance of caution, could have permitted defense counsel further examination of this juror for rehabilitation under state law, or it could have permitted the prosecutor to demonstrate some other proper basis for the juror's disqualification.

The state has a legitimate interest in requiring the parties to make a contemporaneous objection to the exclusion of jurors during voir dire examination. Voir dire examination and the selection of a jury, perhaps more than any other event at trial, is an exercise in trial strategy for the parties. The decisions of counsel whether to accept a juror, to challenge a juror for cause, or to exercise a peremptory challenge are all matters of trial tactics and strategy. There are many reasons why defense counsel might decline to object to the exclusion of a prospective juror. A real possibility exists in every case where no objection is made that defense counsel did not want the juror to serve, and declined to object to the exclusion because of the risk that the juror would then be rehabilitated, which

would then neccessitate the use of a valuable peremptory challenge in order to remove the juror. This is especially true in the instant case, where venireman Stulce stated that she was in favor of the death penalty and believed it to be a deterrent to crime. In the instant case, it cannot be assumed that the yet unestablished defect in Section 12.31(b) found by this Court in Adams v. Texas, supra, was the only reason that defense counsel failed to object to the exclusion of Stulce. 2/

Federal courts have also recognized that reliance on a particular state of the law at the time of trial does not, by itself, constitute cause justifying excuse from the waiver caused by the failure to object. Tyler v. Phelps, __ F.2d __, No. 79-3073, (5th Cir., April 27, 1981)(on petition for rehearing); Dumont v. Estelle, 513 F.2d 793 (5th Cir. 1975); Morris v. Sullivan, 497 F.2d 544 (5th Cir. 1974). In Dumont v. Estelle, supra, the court stated that this rule must apply or later:

> ...the courts would face the complex task of disentangling excusable lack of clairvoyance from quiet strategic waiver. 513 F.2d at 798.

2/ The Court of Criminal Appeals, in overruling Petitioner's motion for rehearing, stated,

> In order for this Court to excuse appellant's failure to object to Stulce's exclusion, we would be required to assume that the prospective juror was acceptable to appellant in every respect and negate the possibility that appellant looked with favor on the court's action in excusing the venireman. Such an assumption would further require speculation that appellant would not challenge her for cause under Art. 35.16, V.A.C.C.P., and that he found Stulce's age, sex, race, occupation, religious preference, marital status, prior jury service etc., acceptable to the extent that he would not have used a peremptory strike against her. Even if we speculate that appellant would not have challenged Stulce for cause or exercised a peremptory challenge on her, we cannot assume that he would have desired to have her as one of the twelve jurors (from the entire panel) who was to render a verdict in his case.

Absent a contrary showing, it cannot be assumed other than that Petitioner did not want this juror to serve.

This Court has consistently recognized the state's interests in requiring contemporaneous objections to objectionable matters at trial. See, Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973); Henry v. Mississippi, 379 U.S. 443 (1965). In Davis, the Court held that absent a requirement that the parties make contemporaneous objections in order to preserve error, the parties would have little incentive to make such objection and,

> [s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of acquittal with the thoughts that if these hopes did not materialize, the claim could be used to upset an otherwise valid conviction at the time when reprosecution might well be difficult.

This is especially true where the asserted error involves jury selection proceedings, where there are a multitude of tactical and strategic reasons why counsel specifically would not want to object to the exclusion of a juror at all. Thus, this Court should decline to review a matter to which no objection was made in the state courts.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

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